

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

HON. KWAME M. KILPATRICK,

Case No. 08-122051-CZ

Plaintiff,

HON. ROBERT L. ZIOLKOWSKI

v.

HON. JENNIFER M. GRANHOLM, in her
official capacity as Governor of the State of
Michigan,

Defendant.

James C. Thomas (P23801)
Attorney for Plaintiff

Kelly G. Keenan (P36129)
John C. Wernet (P31037)
Attorneys for Defendant Governor
Office of Legal Counsel
Office of the Governor

BRIEF IN SUPPORT OF GOVERNOR'S MOTION
TO STRIKE AFFIDAVIT OF JAMES C. THOMAS

The following court rule governs motions to strike pleadings and authorizes the relief
sought in Defendant's accompanying motion:

- (B) Motion to Strike. On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules. MCR 2.115(B).

It is well settled that an affidavit filed in support of or in opposition to a dispositive motion must include an averment that the affiant, if sworn, could testify competently to the facts contained in the affidavit. *Polite v Michigan Tae Kwon Do Ass'n*, 17 Mich App 580, 582; 170 NW 2d 184 (1969). Such an affidavit must also be based upon the affiant's personal knowledge as an affidavit based upon an affiant's information and belief is insufficient to support a summary judgment. *Brooks v Reed*, 93 Mich App 166; 286 NW 2d 81 (1979); *Jones v Shek*, 48 Mich App 530, 532-533, 210 NW 2d 808 (1973); *Sun Insurance Office, Limited v. Keller*, 46 Mich App 761, 208 NW 2d 525 (1973). Finally, an unsworn averment does not establish the existence of a disputed fact. *DeSot v Auto Club Ins Ass'n*, 174 Mich App 251, 253; 435 NW2d 442 (1988).

In this matter, Plaintiff has submitted the affidavit of his attorney, James C. Thomas, in support of his 31-paragraph Complaint. Simultaneous to the filing of his Complaint, Plaintiff filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction that is based largely on Mr. Thomas's affidavit and the otherwise unsubstantiated allegations of Plaintiff's Complaint.

As set forth in Defendant's motion, Mr. Thomas's affidavit consists of broad generalizations and conclusory allegations and thus fails to state with particularity facts admissible as evidence. Indeed, Mr. Thomas merely avers that the allegations contained in the Complaint "are factual and correct except to the extent that they are reflected upon information and belief, and as to those allegations, it is believed that they are true as

well.”[Affidavit of James C. Thomas, ¶ 2]. As well, the affidavit makes a blanket reference to the “contents of Paragraphs (sic) of 15 and 16 of the Complaint” as reflecting “the events as they occurred.” [*Id.*, ¶3]. However, paragraph 16 of the Complaint consists of a litany of statements allegedly attributed to Governor Granholm without any reference to when, where, or to whom such statements were made. Instead, Plaintiff attaches what appear to be copies of newspaper articles, one of which (Exhibit A) lacks even a specific date. (The exhibit indicates it was “6 months ago” – but 6 months ago from what date?) In short, Mr. Thomas’s affidavit not only lacks factual specificity but it relies upon inadmissible hearsay statements.

Finally, the affidavit fails to show affirmatively that Mr. Thomas, if sworn as a witness, can testify competently to the facts stated in the affidavit. This defect alone is a sufficient basis to strike the affidavit. *Polite. supra.*

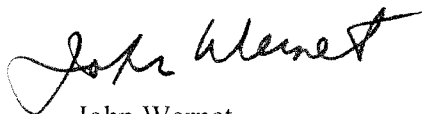
For these reasons, Mr. Thomas’s affidavit must be stricken from the record in this action as it was not drawn in conformity with MCR 2.119(B)(1)(a), MCR 2.119(B)(1)(b), MCR 2.119(B)(1)(c), and MCR 2.114(C)(1).

CONCLUSION

WHEREFORE, the Governor respectfully asks this Court to strike the affidavit of James C. Thomas pursuant to MCR 2.115(B).

Respectfully submitted,

Kelly G. Keenan
Legal Counsel



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Dated: September 2, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the above document was personally served upon the attorneys of record in the above cause, on the 2nd day of September, 2008.

